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Quick Release

A Monthly Survey of Federal Forfeiture Cases

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Criminal Forfeiture / Third-party Rights / Fugitive Disentitlement Doctrine

- **Defendant who transfers property to his wife to avoid criminal forfeiture remains obligated to pay the value of the forfeited property to the Government.**
- **The district court may hold both the defendant and the third party to whom he transferred the property in contempt for refusing to comply with orders intended to force compliance with an order of forfeiture.**
- **Under the fugitive disentitlement doctrine, both Defendant and his wife are considered "fugitives" for leaving the jurisdiction and refusing to comply with the district court's orders; thus, the court of appeals may refuse to consider their appeals.**

Defendant was convicted in a criminal case and ordered to forfeit certain shares of stock. In response to the Government's attempt to enforce the forfeiture order, Defendant revealed that he had transferred the stock to his wife two weeks before his indictment. Thus, Defendant argued, he could not satisfy the forfeiture order.

Applying the relation back doctrine, the district court held that Defendant's attempt to transfer the stock to his wife was void and that Defendant, therefore, remained obligated to pay the value of the stock to the Government. The court also entered an order, which was served on both Defendant and his wife, directing them to produce records needed to determine how much the stock was worth.

Defendant became a fugitive and failed to respond to the production order. His wife filed a response but refused to produce the documents. The court then issued an order to show cause why both the Defendant and his wife should not be held in contempt. When neither party appeared at the show cause hearing, the court found both in contempt and issued arrest warrants.

Defendant remained a fugitive but filed an appeal from the contempt order. His wife renounced her citizenship and moved overseas, but also filed an appeal. In response to the Government's motion to dismiss, the **Eleventh Circuit** held that the "fugitive

First, the court held that in light of the Supreme Court's decision in *Libretti v. United States*, 116 S. Ct. 356 (1995), criminal forfeiture is an aspect of sentencing, and thus the Government's burden is to establish the forfeitability of the property by a preponderance of the evidence.

Second, the court adopted a "but for" test to determine if property, such as Defendants' salaries, could be forfeited under section 1963(a)(1) as property "acquired or maintained" through a pattern of racketeering. In other words, the Government must establish, by a preponderance of the evidence, that "but for" the defendants' RICO violation they would not have acquired the property the Government sought to forfeit.

Defendants' argued that this meant the Government would have to show that the election results would have been different if Defendants had not tampered with the election ballots. But the court disagreed. Such a requirement, the court held, would "render the victors' offices and emoluments virtually invulnerable to forfeiture." Instead, the Government need only show that Defendants tampered with the integrity of the electoral process, and that "but for" the election they would not have held any office, and so would not have received their salaries.

Next, Defendants argued that the Government violated Fed. R. Crim. P. 7(c), by failing to specify that it sought the forfeiture of the salaries in the indictment or in a bill of particulars. But the court found no violation of the Rule. "The [G]overnment is not required to list all forfeitable interests in the indictment" or even in a bill of particulars, the court said. All that is required is that the indictment notify the defendant that the Government will seek to forfeit all property subject to forfeiture under the terms of the applicable forfeiture statute. Because the indictment alleged that all property "acquired or maintained" as a result of the racketeering offense was subject to forfeiture, it complied with Rule 7(c).

Finally, Defendants argued that, at most, the Government could forfeit their net after-tax salaries, but not their gross pretax salaries. Again, the court disagreed. Criminal forfeiture authorizes the forfeiture of gross proceeds, not net profits. Therefore, Defendant's were not entitled to any deduction for taxes they had paid to the Government out of their gross salaries. —*SDC*

United States v. DeFries, 129 F.3d 1293, (D.C. Cir. Dec. 2, 1997). Contact: Frank Marine, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, CRM11!marine.

Comment: This case addresses several issues regarding criminal forfeiture procedure on which there is relatively little case law.

First, this is one of two cases this month to hold that criminal forfeiture is an aspect of sentencing and that, therefore, the burden of proof on the forfeiture issues is preponderance of the evidence. The other is *United States v. Patel*, ___ F.3d ___, No. 96-3331, 1997 WL 763179 (7th Cir. Dec. 10, 1997). This is good news, but it is surprising that in the two years since *Libretti* was decided, only one other appellate court has so ruled. *See United States v. Rogers*, 102 F.3d 641 (1st Cir. 1996) (section 853 case; criminal forfeiture is part of the sentence under *Libretti*). The other circuits continue to apply pre-*Libretti* standards regarding the burden of proof in criminal forfeiture cases. *See United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997) (applying preponderance standard post-*Libretti* without citing *Libretti); United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (without citing *Libretti*, applying preponderance standard in money laundering cases while reaffirming reasonable doubt standard for RICO forfeiture because scope of forfeiture is greater under RICO than under section 982).

Second, regarding what the Government is required to allege in the indictment to comply with Rule 7(c), the case appears to go beyond other decisions holding that the Government did not have to list all

again in amounts under $10,000, into the second account. The Government filed a complaint under 18 U.S.C. § 981(a)(1)(A) seeking forfeiture of the funds as property involved in a structuring offense.

Claimant filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). He argued first that the complaint was defective because it failed to allege that the he was aware of the CTR reporting requirement at the time he conducted the structured transactions. Second, he asked the court to dismiss the complaint because, in the absence of evidence that the funds were derived from unlawful activity, any forfeiture of structured funds would violate the Excessive Fines Clause of the Eighth Amendment.

Regarding the first point, the court noted that the underlying criminal offense—structuring a cash transaction in violation of 31 U.S.C. § 5324(a)(3)—requires proof that the perpetrator acted with intent to evade the currency reporting requirement. The civil forfeiture complaint tracked the language of the criminal statute, alleging that the perpetrator acted with the requisite intent to evade, but it did not specifically allege that he had knowledge of the reporting requirement.

A motion to dismiss a civil forfeiture complaint for failure to state a claim under Rule 12(b)(6) is evaluated in light of the particularity requirement in Rule E(2)(a) of the Supplemental Rules. Rule E(2)(a), the court observed, requires more specificity than mere notice pleading under Fed. R. Civ. P. 8, but it does not require the Government to allege facts explicitly that are otherwise implicit in the complaint. The complaint alleged that the perpetrator acted with intent to evade. Because "a person cannot evade that which he knows nothing about," the complaint implicitly alleged that the perpetrator of the structuring offense had knowledge of the reporting requirement. Thus, Rule E(2)(a) was satisfied.

With respect to the Eighth Amendment issue, Claimant relied on the Ninth Circuit's decision in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996) (any forfeiture for a currency reporting violation is excessive *per se*), *cert. granted*, ___ U.S. ___, 117 S. Ct. 1841 (1997). He argued that because the Government had not alleged that the structured funds were derived from illegal activity, *Bajakajian* should apply. Moreover, he alleged that if the forfeiture of the "clean" structured funds would be unconstitutional *per se*, as the Ninth Circuit held, then the forfeiture complaint should be dismissed pretrial.

The court disagreed with this analysis for several reasons. First, the court noted that *Bajakajian* was a controversial decision that was not universally followed. Indeed, the court held that the Seventh Circuit would most likely not follow *Bajakajian*, but instead would likely hold that funds involved in a structuring offense were the instrumentalities of the offense. Moreover, the court interpreted the Seventh Circuit's prior holdings on the excessive fines issue as applying a pure "instrumentality test" under which a "forfeiture is not excessive unless the connection

The case summaries and comments in ***Quick Release*** are intended to assist government attorneys in keeping up-to-date with developments in the law. They do not represent the policy of the Department of Justice, and may not be cited as legal opinions or conclusions binding on any government attorneys.

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argued, meant that the Government was aware of the offense giving rise to the forfeiture at least seven years before it filed the forfeiture complaint.

In response, the Government offered three arguments: (1) the statute of limitations was tolled during the time Defendant was a fugitive; (2) the limitations period was also tolled during the time Defendant concealed the existence of the property subject to forfeiture; and (3) as far as the section 981 theory was concerned, the Government did not discover the money laundering offense giving rise to the forfeiture until it discovered the existence of the ranch in 1996, and thus the statute of limitations did not begin to run on the section 981 forfeiture count until that time. The district court agreed with the Government on the first two points and found it unnecessary to address the third one.

On the first point, the court noted the statute of limitations is tolled in criminal cases during the time that a person is a fugitive from justice. *See* 18 U.S.C. § 3290. The same rule, the court held, applies to civil forfeiture cases, at least where the claimant was himself the fugitive. In other words, because he was a fugitive from 1989 to 1996, Defendant was barred from asserting that the limitations period continued to run during that period.

On the second point, the court held that the five-year limitations period, which runs from the time the offense giving rise to the forfeiture was discovered, does not include any period during which the claimant concealed the existence of property derived from that offense. So, even though the Government was aware of Defendant's drug dealing as long ago as 1989, Defendant's deliberate concealment of his purchase of the ranch with drug proceeds meant that the limitations period for forfeiture under section 881(a)(6) was tolled until the Government discovered the existence of the ranch and the use of the drug money to purchase it.

Turning to the Government's motion for summary judgment, the court found that the Government had established sufficient probable cause to support the forfeiture under both sections 881(a)(6) and 981(a)(1)(A). In particular, the court found that Defendant earned $1.3 million in drug proceeds in 1986; bought the ranch in Wyoming in 1987 with cash; engaged in numerous attempts to change his name and the name on the title to the real property to conceal or disguise its true ownership; and did not file a tax return or have a legitimate source of income for 20 years. Thus, there was probable cause to believe that the ranch was forfeitable as property traceable to drug proceeds, and as property involved in a financial transaction conducted with the intent to conceal or disguise the nature, source, location, ownership, and control of drug proceeds. —*SDC*

United States v. 657 Acres of Land in Park County, 978 F. Supp. 999 (D. Wyo. 1997).
Contact: AUSA Bob Murray, AWY01(rmurray).

Comment: The court's holding that the fugitive exception to the statute of limitations in section 3290 applies to civil forfeitures will undoubtedly assist the Government in cases where a fugitive claimant is apprehended and attempts to assert a statue of limitations defense to a civil forfeiture. But the court's second rationale for tolling the limitations period may be the more far-reaching of its two holdings.

Prosecutors have long contended that the limitations period in section 1621 did not take into account that in many cases the Government is aware of the offense giving rise to the forfeiture—*e.g.*, the drug offense—long before it learns what the defendant did with the money he derived from the offense. For example, in this case, the Government may have learned in 1989 that the defendant was a drug dealer, but it didn't learn until 1996 that the drug money was used by buy a ranch in Wyoming. A literal reading of section 1621, however, requires the Government to files its civil forfeiture action within five years of discovering the underlying offense, not within five years of discovering the involvement of the defendant property in the offense. *See Santana v.*

packed the bag, so he was unsure of what it contained. He stated, however, that the bag did not contain large sums of currency. Thereafter, August consented to a search of the bag, and agents located numerous bundles of currency each containing about $1,000 wrapped with rubber bands. August stated that the money did not belong to him and that he had no idea how it got into his bag. Questioned further, he admitted to having packed the bag himself, and could not identify the last name of his girlfriend. He then signed a voluntary disclaimer of interest and ownership in the currency, stating that since the money did not belong to him, there was no reason not to sign the disclaimer form. A certified narcotics detector dog similarly reacted to the scent of narcotics after the currency had been placed in an uncontaminated envelope and hidden inside an office. A criminal history check on August's companion Clark revealed prior arrests for cocaine, PCP, and weapons violations.

In each case, the court stated that aside from the dog reaction and one other allegation with a specific "drug" connection, (*i.e.*, Nguyen's cellular phone directory listing a drug dealer's phone number and August's companionship with an individual with prior drug-related arrests), the other allegations cited by the Government in establishing probable cause to forfeit in each case were "general in character" and could be deemed "drug courier profile" characteristics which "are of little value in the forfeiture context." The court went on to discount the value of drug-detector dogs in establishing a link between drug-contaminated currency and drug dealing, noting recent articles citing the contamination of most currency in general circulation. In the end, the court granted the claimants' Rule 12(b)(6) motions, stating that the Government had established little more than a "mere suspicion" that the defendants' property was drug-related. —*JRP*

United States v. $14,876.00, No. CIV-A-97-1967, 1997 WL 722942 (E.D. La. Nov. 18, 1997) (unpublished). Contact: AUSA Larry Benson, ALAE01(lbenson).

United States v. $13,570.00, No. CIV-A-97-1997, 1997 WL 722947 (E.D. La. Nov. 18, 1997) (unpublished). Contact: AUSA Larry Benson, ALAE01(lbenson).

Comment: Airport stop cases are generating a lot of litigation on the probable cause issue. In general, as these two cases from New Orleans illustrate, the Government has difficulty establishing probable cause based only on a drug courier profile, a dog sniff, and some evasive answers. See *United States v. $49,576.00 in U.S. Currency*, 116 F.3d 425 (9th Cir. 1997) (seizure of cash at airport lacked probable cause despite dog sniff, evasive answers, fake identification, courier profile, and prior drug arrest). But if there is some additional circumstantial evidence, such as the manner in which the money is packaged, the Government can succeed in establishing probable cause to believe that the money is drug proceeds. *See United States v. $129,727.00 U.S. Currency*, ___ F.3d ___, 1997 WL 683865 (9th Cir. Nov. 3, 1997) (drug courier profile provided adequate basis for investigative stop, and once bags were opened, large quantity of cash and manner of packaging—bundles wrapped in fabric softener sheets and plastic wrap—provided probable cause); *United States v. One Lot of U.S. Currency ($36,674)*, 103 F.3d 1048 (1st Cir. 1997) (dog sniff, defendant's connection to known criminals, quantity of cash, itinerary of air travel, and evasive answers to questions all add up to probable cause); *United States v. $39,873.00*, 80 F.3d 317 (8th Cir. 1996) (dog sniff, packaging of currency, and proximity to drug paraphernalia provided sufficient probable cause for seizure of currency during highway stop); *United States v. $8,880*, 945 F. Supp. 521 (W.D.N.Y. 1996) (a claimant with history of drug trafficking buys airline tickets with cash using false name, carries no luggage, and refuses to show photo identification to the ticket agent).

What is highly unusual about this case is not the court's finding that the Government lacked probable

bundles of carpets, some of which bore tags indicating that they were made in Iran. The United States seized all of the carpets pursuant to 19 U.S.C. § 1595a(c)(2)(B), alleging that they were imported illegally in violation of 31 C.F.R. § 560.201.

Section 1595 and 31 C.F.R. § 560.201, taken together, authorize the forfeiture of Iranian goods or services, other than Iranian-origin publications and materials imported for news publications or broadcast dissemination. The issue was whether the Government's evidence established probable cause to believe that *all* of the carpets were imported from Iran, as opposed to only those that were tagged at the time they were seized. At trial, the Government presented the evidence regarding the tags that were found on some of the carpets. In addition, an import specialist from the U.S. Customs Service examined the carpets and offered an expert opinion that all of the carpets were made in Iran. Finally, during questioning by the court, the claimant admitted that all of the carpets were from Iran and he presented no evidence that he had a license and/or authorization to import Iranian goods into the United States. The court held for the United States and forfeited the 863 carpets. —*MML*

United States v. 863 Iranian Carpets, ___ F. Supp. ___, No. 96-CV-1488, 1997 WL 727561 (N.D.N.Y. Nov. 17, 1997). Contact: AUSA William Pericak, ANYNA01(wpericak).

Importation of Illegal Goods / Innocent Owner / Adverse Inference / Eighth Amendment

- **Applying *Bennis*, district court finds no innocent owner defense for forfeitures under 18 U.S.C. § 545 or 19 U.S.C. § 1595a.**
- **Adverse inference drawn from importer's invocation of the Fifth Amendment at his deposition is acceptable to show probable cause that importer knew that item was stolen property imported in violation of 18 U.S.C. § 2314 and, thus, forfeitable under 19 U.S.C. § 1595a(c).**
- **Eighth Amendment excessive fines analysis is not applicable to the forfeiture of contraband such as illegal imports because the forfeiture of contraband is not punishment.**

An antique gold platter was discovered in Italy, imported into the United States by a dealer, and subsequently purchased by a buyer. In response to the Italian government's request for assistance in recovering the platter, U.S. Customs agents seized the platter from the buyer for forfeiture under 18 U.S.C. § 545, as merchandise imported by means of false statements in violation of 18 U.S.C. § 542, and under 19 U.S.C. § 1595a(c), as stolen property imported in violation of 18 U.S.C. § 2314. The subsequent complaint for forfeiture alleged that the platter was imported illegally due to false statements that were made by the antique dealer to the U.S. Customs Service concerning the platter's country of origin. The dealer had listed the country from which his flight carrying the platter to the United States originated, Switzerland, as the platter's country of origin; whereas the platter actually had been exported from Italy in violation of Italian laws protecting objects of artistic and historic value.

was an excessive fine, the court pointed out that the Eighth Amendment applies to civil forfeitures only where the forfeiture is in some part punishment, *Austin v. United States*, 509 U.S. 602, 610 (1993). Where the property to be forfeited is contraband, the forfeiture is remedial because it removes illegal items from society. *Id.* at 621. The court ruled that the antique platter imported in violation of the customs laws was contraband and that its forfeiture was remedial and not punitive. Consequently, the court concluded, the forfeiture did not implicate the Eighth Amendment. The court added that, even if the Eighth Amendment were applicable, the forfeiture of the platter would not violate it under the three criteria of *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995) (harshness of the forfeiture relative to the seriousness of the offense; the relation of the property to the offense; and the culpability of the owner). The court considered that the forfeiture of the platter was not particularly harsh, noting that under the terms of his purchase from the dealer, the buyer was entitled to a full refund of the purchase price. At the same time, the court found that dealing in cultural antiquities by means of false statements was "grave." The court found that the buyer's culpability was "unclear." Nevertheless, the court concluded that, even assuming the buyer was innocent, the other considerations would overcome any Eighth Amendment concerns. —*JHP*

United States v. An Antique Platter of Gold, Civ. No. 95-10537 (S.D.N.Y. Nov. 14, 1997) (unpublished). Contact: AUSA Evan T. Barr, ANYSO2(ebarr).

Safe Harbor / Disclosure of Bank Records

- **Eleventh Circuit reverses dismissal of lawsuit against banks for improperly disclosing customers' account information in response to verbal request of law enforcement agents.**

- **A verbal request from federal officers does not authorize a financial institution to disclose account information and, therefore, does not immunize the institution from suit by account holders for making the disclosure.**

- **The safe harbor provisions of the Annunzio-Wylie Anti-Money Laundering Act immunize financial institutions from suit for disclosure of account information only under the specific circumstances set forth in that act.**

Two civil suits were brought against banks for alleged improper disclosure of information about plaintiffs' accounts to federal authorities. The district court dismissed the complaints for failure to state a claim, and the cases were consolidated on appeal. The **Eleventh Circuit** reversed the dismissals and remanded. Because this was an appeal from a Rule 12 dismissal, the appellate court's decision was predicated on an assumption that all of plaintiffs' allegations were true.

The FedWire Fund Transfer System is an electronic funds transfer system which permits large dollar fund transfers by computer-to-computer communications between banks. Both of the defendant banks operate within that system and use electronic storage to maintain the contents of an electronic funds transfer.

In the *Lopez* case, First Union bank received electronic transfers of funds to Lopez's account and

each of these accounts. And, again, the verbal instructions from government agents carried no legal authority in this instance. —*BB*

Lopez v. First Union Nat'l Bank, 129 F.3d 1186, (11th Cir. 1997), *rev'g* 931 F. Supp. 860 (S.D. Fla. 1996).

Effect on Sentence

■ **Civil forfeiture can never be the basis for a downward departure from the Sentencing Guidelines as it is a prohibited factor.**

Defendant, a physician licensed to practice medicine in Florida, was indicted for conspiracy to distribute and distribution of controlled substances, and tampering with a witness. He entered a guilty plea, agreeing to relinquish his medical license and not to contest the civil forfeiture of $50,000, which represented the proceeds of the drug distribution business. Defendant filed a motion for downward departure prior to sentencing, contending entitlement based upon, among other grounds, his voluntary disgorgement of the proceeds of criminal activity. Holding that Defendant's loss of privilege to practice medicine and voluntary disgorgement of proceeds made his case "atypical," the district court adjusted Defendant's guidelines range from 108 to 135 months, to a range of 70 to 87 months. The Government successfully appealed the district court's decision to depart downward: the **Eleventh Circuit** vacated the judgment and remanded the case for resentencing.

Under the Supreme Court's decision in *Koon v. United States*, 116 S. Ct. 2035 (1996), an appeals court must review with deference the district court's determination concerning whether the facts of this case make it "atypical," and thereby take it outside the "heartland" of the applicable sentencing guideline. The Court then determines whether the departure factor relied upon by the district court has been categorically proscribed, encouraged, encouraged but taken into consideration within the applicable guideline, discouraged, or not addressed by the Sentencing Commission, resulting in the need for a different sentence. And finally, the appeals court must review with deference the remaining factually sensitive findings of the district court.

Applying this standard, the Court considered whether the "voluntary disgorgement of proceeds"—civil forfeiture—is a prohibited, encouraged, discouraged or unmentioned factor for departing from the sentencing guidelines. Referring to cases from the Third, Fourth, Seventh and Ninth Circuits, the Court concurred that civil forfeiture cannot be used by a district court as a basis for departure from the sentencing guidelines. Noting that no circuits currently hold to the contrary, the Court reasoned that the plain language in sections 5E1.4 and 5E1.4(d)(5) of the Sentencing Guidelines showed that the commission viewed forfeiture as a wholly separate sanction intended as an addition to imprisonment and not as a replacement for it. Further, the Court believed that the commission's decision to include forfeiture as a relevant factor when setting fines, while omitting forfeiture as a factor that would support a reduction in sentence, indicated that civil forfeiture is relevant only to the possible monetary sanctions that may flow from a criminal conviction, but that it has no bearing upon a convicted defendant's term of imprisonment.

Furthermore, the Court said that whether or not a civil forfeiture is contested is of no consequence as a sentencing matter, as forfeiture lacks the quality of

follows: whether a post-illegal-act transferee can be an innocent owner when it had knowledge of a forfeiture action in federal court.

In resolving this issue, the court focused its discussion on the innocent owner defense embodied in section 881, since it has been the only statutory innocent owner defense interpreted by the Supreme Court and the Third Circuit. Relying on the Third Circuit's decision in *United States v. One 1973 Rolls Royce,* 43 F.3d 794 (3d Cir. 1994), the court held that one could claim innocent ownership so long as the person lacked knowledge, consent or willful blindness of the improper use of the property *at the time the improper use occurred.*

Applying this principle to the instant case, the district court opined that the claimant's knowledge of the forfeiture action was immaterial. Instead, because the claimant had no knowledge that the property was purchased with drug proceeds until after the illegal activity had occurred, the claimant satisfied the requisite elements of the innocent owner defense.

The court was not persuaded by the Government's argument that notice by publication precluded the claimant from obtaining rights superior to the United States because: (1) the United States misfiled the *lis pendens*; (2) the publication gives notice to individuals who have an interest in the property, which claimant did not at the time of publication; and (3) the United States sat on its rights and failed to intervene in the state foreclosure proceeding. Likewise, the court rejected the Government's argument that the "first in time rule" mandates that the district court, the court that first exercised jurisdiction over the res, has exclusive power to decide the property rights. Because the state court's ruling did not conflict with the district court's jurisdiction, the "first in time rule" is inapplicable.

Finally, the court noted that there was nothing in the statutes or the case law that would indicate that the Third Circuit would treat the "knowledge" element of the innocent owner defense in section 982(a)(2) any differently than the one contained in section 881(a)(6). In fact, the court noted that one other district court had reached the same conclusion, *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160 (E.D. Pa. 1993). —*MDR*

United States v. 1993 Bentley Coupe,
___ F. Supp. ___, No. CIV-A-93-1282, 1997 WL 751483 (D.N.J. Nov. 26, 1997). Contact: AUSA Peter O'Malley, ANJ01(pomalley).

Comment: The holding in this case flows from the Third Circuit's decision in *Rolls Royce* which held that the attorney for Mafia leader Nicky Scarfo was an "innocent owner" of Scarfo's Rolls Royce because Scarfo transferred the car to his attorney after it was used in the crime that gave rise to the forfeiture. Focusing on the "lack of consent" prong of the innocent owner defense in section 881, the court held that one cannot "consent" to the illegal use of his property if such use occurs before he has any legal interest in the property. Thus, the court in the *Rolls Royce* case held, *any* post-illegal-act transferee is automatically an "innocent owner" under section 881. In response to the argument that this reasoning produced an absurd result, the court laid the blame on the Supreme Court's holding in *United States v. A Parcel of Land (92 Buena Vista),* 507 U.S. 111 (1993), which held that the innocent owner defense in section 881 contains no "bona fide purchaser" ("BPF") requirement. If the result is absurd or contrary to public policy, the court said, it is up to Congress to correct it by including a BFP requirement in the innocent owner statutes similar to the one in the criminal forfeiture statutes. *See* 21 U.S.C. § 853(n)(6)(B).

The *Rolls Royce* decision is controversial and has been rejected in other circuits. The Eleventh Circuit, for example, holds that a post-illegal-act transferee is not an innocent owner, within the meaning of section 881, if he knows at the time he acquires the property that it is subject to forfeiture and nevertheless consents to the transfer. *See United States v. One Parcel of Real Estate Located at 6640 SW 48th*

Due Process / Notice

■ **Where claimant is incarcerated, due process requires that the Government must attempt to serve notice of forfeiture in prison, but it is not necessary that claimant actually receive notice.**

Claimant moved for reconsideration of a civil forfeiture order on the grounds that he did not receive notice of the forfeiture action until he received the forfeiture order itself in prison. The Government asserted that it sent the forfeiture complaint by certified mail to claimant's counsel and to the claimant in prison. Counsel filed an answer but subsequently moved to withdraw from the case. Consequently, the Government sent its Motion for Summary Judgment both to claimant's counsel and to the claimant in prison by certified mail with return receipt requested. Claimant failed to respond; the court had entered a final order of forfeiture. Notwithstanding this evidence, Claimant challenged the forfeiture on due process grounds claiming that he had never received any of the forfeiture pleadings sent to him and that, although his attorney had informed him of the potential of forfeiture, he had received no notice of the pending forfeiture action until his receipt of the court's forfeiture order.

The court ruled with other courts in similar cases that due process does not require that a potential claimant receive notice of a civil forfeiture action so long as the Government acted reasonably in attempting to provide notice. *See United States v. Scott*, 950 F. Supp. 381, 387 (D.D.C. 1996) (rejecting an incarcerated property owner's due process challenge to administrative forfeitures based on the assertion that he never received any of the notices sent to his places of confinement). The court also noted that when the Government is aware that an interested party is in prison, due process requires the Government to make an attempt to serve him with notice there but does not require actual notice. *See United States v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996) (holding that nonreceipt by prisoner of notice of forfeiture sent by certified mail to him in prison does not negate constitutional adequacy of the Government's attempt to provide him with actual notice there). Accordingly, the court concluded that the Government's efforts to provide notice in this case had satisfied the requirements of due process and rendered the claimant's argument for reconsideration without merit. —*JHP*

United States v. One Parcel of Land etc. 13 Maplewood Drive, No. CIV-A-94-40137, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (unpublished). Contact: AUSA Patrick Hamilton, (phamilto).

Comment: There are only a few cases dealing with the district court's power to assert *in rem* jurisdiction over property located abroad. The consensus among the courts that have addressed the issue is that the district court has *subject matter jurisdiction* over the forfeiture action by virtue of section 1355(a), and that the proper *venue* for such action is either the district where the acts giving rise to forfeiture occurred, or the District of Columbia, pursuant to section 1355(b)(2), but that neither statute, by itself, gives a court *in rem* jurisdiction over the *res* that is subject to forfeiture. To have *in rem* jurisdiction, a court must exercise actual or constructive control over the property. The key decision on this point was the Second Circuit's decision in *All Funds in Any Accounts Maintained in the Names of Meza*, 63 F.3d 148 (2d Cir. 1995), which held that a district court had *in rem* jurisdiction over property in the United Kingdom because the seizure of the property by U.K. authorities at request of the United States gave the court constructive possession or control over the property. *See also United States v. Certain Funds (Hong Kong and Shanghai Banking Corporation)*, 96 F.3d 20 (2d Cir. 1996) (section 1355(b)(2) applies retroactively to create in rem jurisdiction over property in Hong Kong), *rev'g* 922 F. Supp. 761 (E.D.N.Y. 1996). —*SDC*

Double Jeopardy

■ Supreme Court overrules *United States v. Halper.*

Between 1994 and 1996, a number of courts, led by the Ninth Circuit, held that civil forfeiture constituted "punishment" for double jeopardy purposes, and that a criminal prosecution following a civil forfeiture, or vice versa, was unconstitutional. As a result, there was a dramatic decline in civil forfeiture activity throughout the United States. Ultimately, the Supreme Court reversed the lower court decisions in *United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996), and all was well again.

A new decision from the Supreme Court adds an historical footnote to the double jeopardy story. The adverse decisions regarding civil forfeiture were based on the Supreme Court's earlier decision in *United States v. Halper*, 490 U.S. 435 (1989), which held that a civil penalty under the False Claims Act could be considered "punishment" for double jeopardy purposes if it was grossly disproportionate to the underlying crime. In *Ursery*, the Court held, in essence, that *Halper* did not apply to civil forfeiture cases which had historically been recognized as remedial in nature and thus not subject to the Double Jeopardy Clause. But forfeiture cases aside, *Halper* remained good law and continued to trouble prosecutors attempting to bring criminal charges against individuals who had been subjected to all manner of civil sanctions in other contexts.

Now the Supreme Court has dispensed with *Halper* all together, consigning it, in the Court's words, to "legal limbo." In a case involving a prosecution for bank fraud following the imposition of sanctions by the Office of the Comptroller of the Currency for the same banking violations, the Court held that *Halper's* analytical framework had proved to be "unworkable." Returning to what was known as the *Kennedy-Ward* test, the Court held that a statute designated as civil on its face would not trigger double jeopardy concerns unless there was the "clearest proof" that the sanctions were "so punitive in form and effect" as to render them criminal despite Congress' contrary intent.

To those who were involved in the double

payments are not subject to forfeiture to the Government. The court forfeited the unused sick or vacation pay as substitute assets. —*MLC*

United States v. Parise, No. 96-273-01, 1997 WL 431009 (E.D. Pa. July 15, 1997) (unpublished). Contact: AUSA Timothy R. Rice, APAE02(trice).

Quick Notes

■ Solicitor General Authorizes *Cert. Petition* in *Peyton Road*

In *United States v. 408 Peyton Road*, 112 F.3d 1106 (11th Cir. 1997), the Eleventh Circuit held that the Due Process Clause prohibits the Government from posting an arrest warrant *in rem* on real property without prior notice and a hearing, even if the warrant does not interfere with the property owner's use and enjoyment of the property. The ruling invalidates the Government's "post and walk" policy and appears to be inconsistent with the Supreme Court's ruling in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), from which the "post and walk" policy was derived.

On December 17, 1997, the Solicitor General authorized the filing of a petition for a writ of *certiorari* in the Supreme Court, asking the court to review the *Peyton Road* decision. The petition will be filed, at the latest, by the end of January.

■ Gambling / Territorial Waters

The Government brought a civil forfeiture action against a "gambling ship," alleging that the vessel was involved in gambling activities within the territorial waters of the United States in violation of 18 U.S.C. § 1081. The gambling took place more than three miles, but less than twelve miles, off the coast of Long Island, New York.

At the time section 1081 was enacted, the term "territorial waters" referred to a distance of three miles. In 1996, Congress passed legislation extending the territorial waters of the United States to a distance of twelve miles. The district court held, however, that the new legislation only extended criminal jurisdiction to a distance of twelve miles; it did not alter the substantive terms of any criminal statute. Conducting gambling activities within the "territorial waters" of the United States is a substantive element of an offense under section 1081. Therefore, notwithstanding the extension of criminal jurisdiction to a distance of twelve miles, an act constitutes a substantive violation of section 1081 only if it occurs within the three-mile limit in effect when the statute was enacted. Because the ship was outside that limit, there was no section 1081 violation and, hence, no basis for the forfeiture.

United States v. One Big Six Wheel, ___ F. Supp. ___, No. 97-CV-6500, 1997 WL 760229 (E.D.N.Y. Dec. 3, 1997). Contact: AUSA Stephen Kelly, ANYE11(skelly).

Federal Money Laundering Case Outline 1998 Now Available

The 1998 edition of "Federal Money Laundering Cases" is now available from the Asset Forfeiture and Money Laundering Section. This paperbound book collects all reported cases interpreting the substantive money laundering statutes, 18 U.S.C. §§ 1956-57, and the related civil and criminal forfeiture statutes, 18 U.S.C. §§ 981-82. Copies may be requested by contacting Beliue Gebeyehou at (202) 514-1263, CRM20(bgebeyeh).

Double Jeopardy

- ***Hudson v. United States***, ___S. Ct.___, No. 96-976, 1997 WL 756641 (Dec. 10, 1997) Jan. 1998

Drug Courier Profiles

- ***United States v. $13,570.00***, No. CIV-A-97-1997, 1997 WL 722947 (E.D. La. Nov. 18, 1997) (unpublished) Jan. 1998

- ***United States v. $14,876.00***, No. CIV-A-97-1967, 1997 WL 722942 (E.D. La. Nov. 18, 1997) (unpublished) Jan. 1998

Due Process

- ***United States v. One Parcel of Land etc. 13 Maplewood Drive***, No. Civ-A-94-40137, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (unpublished) Jan. 1998

- ***United States v. 4333 South Washtenaw Avenue***, No. 92-C-8009, 1997 WL 587755 (N.D. Ill. Sept. 19, 1997) (unpublished) Jan. 1998

Effect of Sentence

- ***United States v. Hoffer***, 129 F.3d 1196 (11th Cir. 1997) Jan. 1998

Eighth Amendment

- ***United States v. An Antique Platter of Gold***, Civ. No. 95-10537 (S.D.N.Y. Nov. 14, 1997) (unpublished) Jan. 1998

Employee Benefits

- ***United States v. Parise***, No. 96-273-01, 1997 WL 431009 (E.D. Pa. July 15, 1997) (unpublished) Jan. 1998

Excessive Fines

- ***United States v. Funds in the Amount of $170,926.00***, ___F. Supp.___, No. 97-C-2104, 1997 WL 735802 (N.D. Ill. Nov. 25, 1997) Jan. 1998

Fugitive Disentitlement Doctrine

- ***United States v. Barnette***, 129 F.3d 1179 (11th Cir. 1997) Jan. 1998

Gambling

- ***United States v. One Big Six Wheel***, ___F. Supp.___, No. 97-CV-6500,

Pension Funds

- ***United States v. Parise***, No. 96-273-01, 1997 WL 431009 (E.D. Pa. July 15, 1997) (unpublished) Jan. 1998

Probable Cause

- ***United States v. 657 Acres of Land in Park County***, 978 F. Supp. 999 (D. Wyo. 1997) Jan. 1998
- ***United States v. 863 Iranian Carpets***, ___ F. Supp. ___, No. 96-CV-1488, 1997 WL 727561(N.D.N.Y. Nov. 17, 1997) Jan. 1998
- ***United States v. $13,570.00***, No. CIV-A-97-1997, 1997 WL 722947 (E.D. La. Nov. 18, 1997) (unpublished) Jan. 1998
- ***United States v. $14,876.00***, No. CIV-A-97-1967, 1997 WL 722942 (E.D. La. Nov. 18, 1997) (unpublished) Jan. 1998

RICO

- ***United States v. DeFries***, 129 F.3d 1293 (D.C. Cir. 1997) Jan. 1998

Safe Harbor

- ***Lopez v. First Union National Bank***, 129 F.3d 1186 (11th Cir. 1997), *rev'g* 931 F. Supp. 860 (S.D. Fla. 1996) Jan. 1998

State Court Foreclosure Proceedings

- ***United States v. 1993 Bentley Coupe***, ___ F. Supp. ___, No. Civ-A-93-1282, 1997 WL 751483 (D.N.J. Nov. 26, 1997) Jan. 1998

Statute of Limitations

- ***United States v. 657 Acres of Land in Park County***, 978 F. Supp. 999 (D. Wyo. 1997) Jan. 1998

Structuring

- ***United States v. Funds in the Amount of $170,926.00***, ___ F. Supp. ___, No. 97-C-2104, 1997 WL 735802 (N.D. Ill. Nov. 25, 1997) Jan. 1998

Substitute Assets

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Territorial Waters

- ***United States v. One Big Six Wheel***, ___ F. Supp. ___, No. 97-CV-6500, 1997 WL 760229 (E.D.N.Y. Dec. 3, 1997) Jan. 1998

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- ***United States v. Barnette***, 129 F.3d 1179 (11th Cir. 1997) Jan. 1998

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Importation of Illegal Goods

- ***United States v. An Antique Platter of Gold***, Civ. No. 95-10537 (S.D.N.Y. Nov. 14, 1997) (unpublished) Jan. 1998

- ***United States v. 863 Iranian Carpets***, ___ F. Supp. ___, No. 96-CV-1488, 1997 WL 727561 (N.D.N.Y. Nov. 17, 1997) Jan. 1998

Indictment

- ***United States v. DeFries***, 129 F.3d 1293 (D.C. Cir. 1997) Jan. 1998

Innocent Owner

- ***United States v. An Antique Platter of Gold***, Civ. No. 95-10537 (S.D.N.Y. Nov. 14, 1997) (unpublished) Jan. 1998

- ***United States v. 1993 Bentley Coupe***, ___ F. Supp. ___, No. Civ-A-93-1282, 1997 WL 751483 (D.N.J. Nov. 26, 1997) Jan. 1998

Jurisdiction

- ***United States v. All Funds in "The Anaya Trust" Account***, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) Jan. 1998

Money Laundering

- ***United States v. All Funds in "The Anaya Trust" Account***, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) Jan. 1998

- ***United States v. Funds in the Amount of $170,926.00***, ___ F. Supp. ___, No. 97-C-2104, 1997 WL 735802 (N.D. Ill. Nov. 25, 1997) Jan. 1998

- ***United States v. 657 Acres of Land in Park County***, 978 F. Supp. 999 (D. Wyo. 1997) Jan. 1998

Notice

- ***United States v. One Parcel of Land etc. 13 Maplewood Drive***, No. Civ-A-94-40137, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (unpublished) Jan. 1998

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jeopardy litigation in forfeiture cases, this result is heartening, even if it is now unnecessary in light of *Ursery*. But there is one cautionary footnote to the tale. In his concurring opinion, Justice Souter notes that historically, civil statutes were virtually never found to be criminal in nature under the *Kennedy-Ward* test because the "clearest proof" of punitive form and effect was rarely found. But, says Justice Souter, that could change. "[T]he expanding use of ostensibly civil forfeitures and penalties under the exigencies of the current drug problems, a development doubtless spurred by the increasingly inviting prospect of its profit to the [G]overnment," could result in a departure from what has been, until now, a narrow interpretation of the "clearest proof" requirement. "On the infrequency of 'clearest proof,'" he concludes, "history may not be repetitive."

—SDC

Hudson v. United States, ___ S. Ct. ___, No. 96-976, 1997 WL 756641 (Dec. 10, 1997). Contact: AUSA Michael R. Dreeben, OSG01!mrd.

Pension Funds / Employee Benefits / Substitute Assets

- **The provision of the Employment Retirement Income Security Act (ERISA)—the federal statute governing pension plans, preventing alienation of benefits to third parties—prevents forfeiture of pension benefits to the Government, notwithstanding the Government's agreement to turn over forfeited pension benefits to the Pension Fund.**

- **Government may obtain forfeiture of defendant's claim to unused sick or vacation pay as substitute assets.**

In a trial for racketeering and other crimes, a former union president was found guilty of union fund theft. The Government obtained a forfeiture money judgment. The Government sought to satisfy the money judgment through the forfeiture as substitute assets of defendant's claim against the union fund for unused sick or vacation pay and monthly pension payments. Defendant argued that forfeiture of his monthly pension payments would violate federal law.

The Employment Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 *et seq.* was enacted to standardize pension plans and provide security to those dependent upon pensions for retirement. ERISA provides that pension benefits are "nonforfeitable" and "may not be assigned or alienated." It also provides that employee benefit plan fiduciaries shall be personally liable for losses to the plan from a breach of fiduciary duty.

The Government argued that the forfeiture it sought was analogous to a union fund set off approved by the Third Circuit in *Coar v. Kazimir*, 990 F.2d 1413 (3d Cir. 1993). The court disagreed. The court noted that the Third Circuit concluded in *Coar* that ERISA's anti-alienation provision did not preclude the union pension fund from taking a set off to recover funds lost in defendant's breach of fiduciary duties. The Third Circuit held that the set off was appropriate because the anti-alienation provision applies only to third parties, the court said, and not to the pension plan itself. The court reasoned that, notwithstanding the Government's intention to return any forfeited pension funds to the union fund, the Government is a prohibited third party.

Accordingly, the court held that the pension

Jurisdiction / Venue / Money Laundering

- **A district court has *in rem* jurisdiction over property located abroad if it is seized by a foreign official acting at the request of the United States.**

- **Complaint for forfeiture of property located abroad may be filed in the District of Columbia under 28 U.S.C. § 1355(b)(2).**

A drug dealer opened a bank account on the Isle of Jersey in the Channel Islands with funds derived from drug trafficking. The money was deposited into the account either as cash physically delivered to the bank, or in the form of wire transfers from a New York bank account into which numerous cashiers checks in amounts under $10,000 had been deposited.

The drug dealer then called the bank and asked that the balance in the account be transferred to Claimants, purportedly in payment for land in Mexico. The bank transferred the funds, whereupon Claimants directed that a portion of the money be transferred to their account in the United States. Believing this sequence of events to be suspicious, the foreign bank alerted U.S. law enforcement officials to the transfer. The U.S. Customs Service seized the funds when they arrived, and after a jury rejected Claimants' innocent owner defense, they were forfeited pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The Ninth Circuit affirmed. 72 F.3d 135 (9th Cir. 1995).

Meanwhile, U.S. officials asked officials in the Channel Islands to seize the remaining balance in Claimants' bank account in New Jersey. The foreign officials did so, and the United States filed a second *in rem* forfeiture action against those funds pursuant to 28 U.S.C. § 1355(b)(2) in the District of Columbia. (The parties later stipulated to a change of venue to the Northern District of California where some of the acts giving rise to the forfeiture took place.)

Addressing cross-motions for summary judgment, the district court held first that it had *in rem* jurisdiction over the funds in a foreign bank account because the funds were seized by a foreign official acting on behalf of the United States. Second, it rejected the notion that the Government was barred by the doctrine of collateral estoppel from bringing a second forfeiture action based on the facts that supported the first forfeiture. When a bank account is divided into two parts, the Government may file separate and sequential forfeiture actions against each part, particularly where forfeiture of the part that remained overseas required the assistance of foreign officials and the invocation of the district court's jurisdiction under section 1355(b)(2).

Finally, the court held that Claimants' innocent owner defense was identical to the defense that the jury rejected in the first case, and so did not present a material issue of fact that required a second trial. Accordingly, the court denied Claimants' motion and entered summary judgment for the Government.

—DAB

United States v. All Funds in "The Anaya Trust" Account, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished). Contact: AUSA Robert D. Ward, ACAN01(rward).

Street, 41 F.3d 1448 (11th Cir. 1995) (attorney who acquires property knowing that it was used to commit an illegal act is not an innocent owner); *see also United States v. 3 Parcels in La Plata County*, 919 F. Supp. 1449 (D. Nev. 1995) (claimant must show he is the holder of an ownership interest who was, at the time of acquiring the interest, ignorant of the illegal conduct giving rise to the forfeiture action); *United States v. Funds in the Amount of $228,390*, 1996 WL 284943 (N.D. Ill. 1996) ("if a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense").

Nevertheless, *Rolls Royce* remains the law in the Third Circuit. But it is questionable whether it should have been applied in the instant case. The forfeiture here was based on both sections 881 and 981. The former statute allows an innocent owner defense based on either "lack of knowledge" or "lack of consent." The holding in *Rolls Royce* was based on the "lack of consent" prong. But the innocent owner defense in section 981(a)(2) contains no "lack of consent" prong; the only defense is "lack of knowledge." Because the claimant clearly had knowledge of the forfeiture action at the time its legal interest in the property vested by virtue of the action of the state court, the district court could have distinguished *Rolls Royce* and rejected the innocent owner defense. —*SDC*

Due Process

- **Unless a criminal defendant can show bad faith on the part of the Government, the destruction of potentially useful evidence does not constitute the denial of due process.**

In 1990, local law enforcement officials recovered cocaine from Claimants' home. During the state criminal trial, Claimants stipulated that the substance found in their home was cocaine, but a state court found Claimants not guilty of possession or constructive possession of the cocaine. Nevertheless, the United States sought civil forfeiture of Claimants' home under 21 U.S.C. § 881(a). When Claimants sought the narcotics for independent testing. The Government responded that it did not possess the narcotics and, therefore, could not produce them. Claimants then moved for summary judgment.

In their motion for summary judgment, Claimants argued that the Government violated their rights under the Due Process Clause. However, Claimants cited no authority supporting their argument that in an *in rem* civil forfeiture case, due process requires that the Government provide Claimants with confiscated samples of the narcotics that gave rise to the action. Claimants argued that they had the right to test confiscated samples of narcotics, but the district court held that unless a criminal defendant can show bad faith on the part of the Government, the destruction of potentially useful evidence does not constitute the denial of due process. The destruction of evidence violates a right to due process only if the evidence possesses an exculpatory value that was apparent before the evidence was destroyed. Accordingly, the court denied Claimants' motion for summary judgment. —*MML*

United States v. 4333 South Washtenaw Avenue, 1997 WL 587755 (N.D. Ill. Sept. 19, 1997) (unpublished). Contact: AUSA Carole Ryczek, AILN02(cryczek).

voluntariness that restitution (a basis for departure in some jurisdictions) holds. Thus, the Court concluded that civil forfeiture is a "prohibited factor" that can never provide the basis for a downward departure from the sentencing guidelines. Because a district court, by definition, abuses its discretion when it makes an error of law, the Court found that the district court's reliance upon Defendant's "voluntary disgorgement" as a basis for downward departure was an abuse of discretion. —*WJS*

United States v. Hoffer, 129 F.3d. 1196 (11th Cir. 1997). Contact: AUSA Debra Herzog, AFLS01(dherzog).

Innocent Owner / State Court Foreclosure Proceedings

- **Claimant who purchased defendant property from local municipality at tax sale found to be innocent owner even though claimant was aware of the United States' forfeiture proceeding.**
- **Court applies innocent owner defense in 21 U.S.C. § 881(a)(6) to 18 U.S.C. § 981(a)(2).**

The United States sought forfeiture of a piece of real property pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A), contending that the property was purchased with drug proceeds. The United States filed its complaint, served the property owner with a warrant of arrest *in rem*, published notice of the forfeiture action, and filed a notice of *lis pendens* in the local land records. Unfortunately, the United States misfiled the *lis pendens* so that a subsequent title search of the property would not reveal the existence of the forfeiture action. The forfeiture action was then stayed pending the outcome of a New York state criminal prosecution of the property owner.

While the stay was in effect, the property owner stopped paying taxes on the property and the local municipal tax collector included the property in a tax sale. An investment group, later to become a claimant in the forfeiture action, purchased the defendant property at the tax sale, and recorded its tax sale certificate in the local register's office. After the two-year statutory waiting period expired, the claimant instituted a foreclosure action and published notice of same. The next day, the U.S. Marshals Service advised the claimant that it had received notice of the foreclosure action, but that the United States had already begun forfeiture proceedings against the property. Several attempts by the United States and the claimant to resolve this matter proved unsuccessful, but the United States never intervened or filed a claim in the state court proceedings.

Ultimately, the state court issued a final order of foreclosure vesting claimant with fee simple title to the property, whereupon the claimant filed a claim and answer in the federal forfeiture proceeding, asserting that it was an "innocent owner" of the defendant property.

The Government moved for summary judgment, asserting that the claimant was not an innocent owner since it knew about the forfeiture action before the state court ruled in its favor. The claimant argued that such knowledge was irrelevant and that the critical issue was whether it knew of the illegal activity when it occurred. The court thus framed the issue as

disclosed this information to federal law enforcement authorities based solely on the agents' verbal authorizations. When the agents seized the account with a warrant, the bank again provided information about the electronic funds transfer. The forfeiture case was settled by forfeiture of a portion of the funds and return of the balance to Lopez.

Lopez then sued under the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2501 *et seq.* and the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401 *et seq.* The district court's dismissal of this suit was based solely on its conclusion that the "safe harbor" provision in the Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3), immunized the bank from liability. The Eleventh Circuit disagreed for the following reasons.

Lopez's ECPA Claims. The ECPA defines the conditions under which the Government is entitled to access an individual's electronic communications, and provides a civil cause of action for anyone injured by a wrongful disclosure. Although the 1996 amendment to ECPA specifically excluded electronic funds transfers from the definition of "electronic communications," it was enacted too late to affect the instant case. Therefore, Lopez's complaint did state a cause of action under 18 U.S.C. § 2702(a)(1) because it alleged that the bank was an electronic communication service which wrongfully divulged the contents of a communication while in electronic storage. Although the bank denied that it was an electronic communications service, plaintiff's allegations are accepted as true under a motion to dismiss.

The complaint also stated a claim under 18 U.S.C. § 2703 because it alleged that the bank was an electronic communications service which disclosed without the required warrant the contents of an electronic communication held in electronic storage for less than 180 days. However, the complaint failed to state a claim under 18 U.S.C. § 2511(3)(a) because that provision applies to the divulging of information during transmission and there was no allegation of transmission in the complaint.

Lopez's RFPA Claims. This act defines the conditions under which the Government may access an individual's financial records and provides a cause of action for wrongful disclosure. Although the act, at 12 U.S.C. § 3403(c), authorizes disclosure by a bank to the Government of information relevant to a possible violation of law involving one of the bank's accounts, the disclosure is limited to the name of the account holder and the nature of the suspected illegal activity. Since the complaint alleges that the bank in this instance disclosed more than that, it states a cause of action.

Safe Harbor Provisions. The safe harbor provisions of section 5316 authorize the Secretary of the Treasury to promulgate regulations requiring banks to report suspicious financial transactions and immunizes financial institutions and their employees from liability for doing so. These provisions apply to all forms of information, including electronic. However, immunity is provided only if the disclosure falls into one of three categories. The first is where the financial institution has a good faith suspicion of a violation. Since plaintiff alleges the absence of a good faith suspicion, its compliant must survive a motion to dismiss. The second category is where the disclosure is pursuant to a governmental requirement, but the pertinent regulations had not yet been promulgated. The third category is "any other authority." This would authorize disclosure pursuant to the seizure warrant but not the verbal governmental request for information because that request did not have the force of law.

In the second case, BankAtlantic notified federal agents of unusual amounts and movement of funds and gave them access to financial information in electronic storage. Many accounts were seized, but about 500 were released because they had no connection with money laundering. Some account holders filed a class action suit under ECPA and RFPA. The district court dismissed their suit based solely on the provisions of section 5316 permitting disclosure for a good faith suspicion of illegal activity. That was error because over 1,000 accounts were involved and the district court could not assume that the bank had a "good faith" suspicion concerning

The claimant buyer moved for summary judgment arguing that the platter was not subject to forfeiture because the misstatements to the U.S. Customs Service were not material as required for an illegal importation violation. The buyer also argued that his innocent ownership of the platter precluded its forfeiture and that forfeiture of the platter would violate the Eighth Amendment's Excessive Fines Clause. The Government argued that the buyer lacked standing to contest the forfeiture because Italy was the platter's true owner. But the court had no difficulty concluding that the buyer had standing to contest the forfeiture because of his undisputed possession of, dominion and control over, and financial stake in the platter from the time he had purchased it for $1.2 million from the dealer until its seizure by the U.S. Customs Service.

The court acknowledged that for a violation of section 542, the false statement must be material. The court pointed out, however, that the issue was whether materiality required meeting the rigid "but for" causation standard advocated by the claimant. This standard requires the false statement to be a statement without or "but for" which importation would not have been allowed. The Government advocated a broader "significant effect" standard. Under this standard, a false statement is material if it had the potential significantly to affect the integrity or operation of the importation process as a whole. The court agreed with the Government that section 542's prohibition of importation "by means of" false statements is not synonymous with "because of." The court ruled that the materiality required for false statements on U.S. Customs forms for violation of 18 U.S.C. § 542, and in turn for the forfeiture of the platter under 18 U.S.C. § 545, should be determined by whether the statements would have had a natural tendency to influence the actions or decisions of the U.S. Customs Service and not whether they can be proved to have been the crucial factor in Customs' admission of the object. Applying the significant effect standard, the court concluded that the dealer's misstatements concerning the platter's country of origin were materially false in violation of section 542 and that the platter, thus, was forfeitable under section 545 because truthful identification of Italy as the source country would have alerted the U.S. Customs Service to the fact that the antique platter was being imported from a country with strict antiquity-protection laws.

As to the buyer's innocent ownership of the platter, the court pointed out that *Bennis v. Michigan*, 116 S. Ct. 994, 999-1000 (1996), made it clear that courts should not read an innocent owner defense into a forfeiture statute that has none. Consequently, the court ruled that, because section 545 contains no express provision for an innocent owner defense and because there is no language in the statute from which properly to infer such a defense, the Government was entitled to forfeiture of the platter pursuant to section 545 regardless of the buyer's innocence concerning the underlying offense.

The court also upheld the Government's theory for forfeiture of the platter pursuant to 19 U.S.C. § 1595a(c) as stolen property imported in violation of 18 U.S.C. § 2314. The court pointed out that section 2314 prohibits the importation of merchandise known to be stolen at the time of its importation and that under section 2314 an object may be considered "stolen" if a foreign nation has assumed ownership through laws protecting its artistic and cultural legacy. The court found that—as the result of such laws in Italy—Italy was the owner of the platter and that the platter was "stolen" within the meaning of section 2314.

The court based its finding of probable cause that the dealer who imported the platter knew it was stolen at that time on the dealer's false statements on the U.S. Customs forms concerning the platter's country of origin, his avoidance of direct travel to and from Italy in obtaining the platter, and the fact that he had invoked the Fifth Amendment at his deposition. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (permitting the court to take an adverse inference from the invocation of the Fifth Amendment in civil cases). Accordingly, noting the absence of an innocent owner provision under section 1595a(c) also, the court concluded that the Government was entitled to forfeiture of the platter pursuant to section 1595a(c) as well.

In response to the buyer's claim that the forfeiture

cause, but the fact that the court entered its finding in granting the claimant's motion to dismiss. Generally, probable cause is not determined until the time of trial. Lack of probable cause at the time of seizure may result in the suppression of evidence, and it may result in the return of the seized property to the claimant pending trial, but it is not grounds for the dismissal of a complaint. To the contrary, except in the Ninth Circuit, where the Government must have probable cause at the time it files its complaint, the Government has the right to bolster its evidence through the discovery process, and to rely on such after-acquired evidence to establish probable cause at trial. *See United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (unless the claimant challenges seizure, as in a motion to suppress, the Government not required to establish probable cause until the time of trial); *United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 651 (E.D. Mich. 1992) (the Government must have opportunity at trial to demonstrate probable cause to believe that the seized property is traceable to the property that facilitated the offense; motion to dismiss complaint denied). *See also* Cassella, "Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases," *New York Law School Law Review*, Vol. 34 [1994]: 163.

It is only in the unusual situation where no set of facts could support a finding of probable cause as to all or a portion of the defendant property that a court will grant a pretrial motion to dismiss. *See United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 445-46 (E.D.N.Y. 1992) (claimant generally not entitled to hearing on probable cause until trial, but where no set of facts could support probable cause with respect to portion of funds in account, arrest warrant *in rem* must be vacated in part, and funds returned); *United States v. Certain Accounts*, 795 F. Supp. 391, 397-99 (S.D. Fla. 1992) (where complaint fails to state any basis for forfeiture of untainted portion of funds in account, motion to dismiss for failure to comply with particularity requirement must be granted).

The opinions in the New Orleans cases do not indicate whether the Government opposed the motion to dismiss on the ground that it ought to be able to conduct discovery to develop additional evidence that would support a finding of probable cause at trial. It may be that the Government had no additional evidence and so was content to let the case sink or float based on the evidence set forth in the complaint.

Finally, the case does not discuss the claimant's standing. Given the claimant's denial, in one case at least, as to any knowledge of the funds he was carrying in his luggage at the airport, it seems likely that the Government could have challenged his claim for lack of standing. Even though the claimant was in possession of the seized funds, his statements at the airport revealed that he was at most a bailee, and the law is clear that a bailee lacks standing to contest the forfeiture of currency seized from his possession unless he identifies the bailor who gave him the subject currency. *See United States v. $205,991.00 in United States Currency*, ___ F. Supp. ___, No. 97-CIV-3520, 1997 WL 669839 (S.D.N.Y. Oct. 28, 1997) (unpublished) (bailee's failure to identify bailor is grounds for dismissal of claim for failure to comply with Rule C(6)). —*SDC*

Probable Cause / Importation of Illegal Goods

- **The Government had probable cause to forfeit an entire load of illegally imported Iranian carpets, even though only a fraction of the carpets had tags indicating their place of origin.**

State troopers stopped two rental trucks, both appearing to be overweight, that were traveling from Canada through New York State. A border patrol agent then searched the trucks and found large

United States Customs Service, 972 F. Supp. 304 (M.D. Pa. 1997) (statute of limitations runs from the date that the Government became aware of drug offense, not date it discovered nexus between drug proceeds and certain financial instruments and seized them).

The Department of Justice has proposed a legislative "fix" for this problem. *See* Section 409 of H.R. 1745 (amending section 1621 to commence the five-year period with the discovery of the offense, or the discovery of the involvement of the property in the offense, whichever is later). But the court's approach in this case provides a different solution: to allow the limitations period to begin to run when the Government discovers the offense, but to toll the statute during such time as the claimant conceals the connection between the property and the offense. For such a tolling provision to apply, it would not matter whether or not the claimant was a fugitive, for even a convicted defendant can conceal the location of the proceeds of the crime for which he was convicted. —*SDC*

Probable Cause / Airport Stop / Drug Courier Profiles / Dog Sniff

■ **District court holds in two cases that the Government failed to establish probable cause to forfeit currency seized from couriers at airports.**

In two cases involving suspect couriers at airports, the U.S. District Court for the Eastern District of Louisiana granted claimants' Rule 12(b)(6) motions to dismiss and found that the Government had failed to prove probable cause to forfeit the money seized.

In *United States v. $14,876.00*, Drug Enforcement Administration (DEA) and local law enforcement agents observed suspect Nguyen purchasing a one-way cash ticket for a flight to Houston, Texas, which was to depart ten minutes later. Nguyen appeared nervous and ran toward his gate as the agents followed. The agents approached Nguyen and asked to speak to him. Nguyen consented, and in a trembling voice related that he was going to visit a niece. He could not, however, remember her last name. Nguyen denied carrying any large sums of money, and consented to a search. Agents found a large bundle of $100 bills in his pocket, and discovered a stack of currency in each of Nguyen's shoes. Nguyen then explained that he owned a market in Pascagoula, Mississippi, and that the money had been stored in a safe there. He stated that he was traveling to Houston to give the money to his niece, since her father was his good friend. Agents then found that Nguyen was carrying a pager and cellular phone with an electronic directory containing the number of a individual arrested four months earlier for possessing eleven kilos of cocaine with intent to deliver. A certified narcotics detector dog indicated that the cash, placed inside an uncontaminated envelope by the agents, was contaminated with the scent of narcotics.

In *United States v. $13,570,* another DEA agent and the same local agents saw two men, August and Clark, at the airline ticket counter. Although they walked into the airport together carrying matched luggage, the pair never acknowledged one another once in line. Each purchased a one-way cash ticket to Houston, Texas, and separately departed for the gate. One agent then had August's checked bag held at the ticket counter. The agents approached August, who stated that he was going to visit his girlfriend for a couple of days. He explained that his girlfriend had

between the offense and the property is incidental and fortuitous." Thus, the court held that Claimant's Eighth Amendment objection to the civil forfeiture of the structured funds was probably wrong on the merits.

But the court held that it was premature to reach the merits of an Eighth Amendment claim in the context of a pretrial motion to dismiss. The Government, the court held, is not required to plead all defenses to an Eighth Amendment claim in its complaint. Thus, even if it were true that the forfeiture of "clean" money in structuring case would be unconstitutional, the Government was not required to allege that the funds were derived from illegal activity in the complaint. All that the Government is required to do is to allege facts tending to establish what the substantive forfeiture statute requires—*i.e.*, that the property was "involved in" a money laundering offense in violation of sections 981(a)(1)(A) and 5324(a)(3).

The determination that a forfeiture is excessive, the court held, must be made only after the Government establishes the forfeitability of the property at trial. Then, upon the filing of an appropriate Eighth Amendment motion, the claimant will have the opportunity to establish the legal nature of his funds, and force to court to determine if the forfeiture of such funds would be unconstitutional.

Accordingly, the court denied the motion to dismiss. —*SDC*

United States v. Funds in the Amount of $170,926.00, ___ F. Supp. ___, No. 97-C-2104, 1997 WL 735802 (N.D. Ill. Nov. 25, 1997). Contact: AUSA Matthew Tanner, AILN02(mtanner).

Statute of Limitations / Money Laundering / Probable Cause

- **Statute of limitations for civil forfeiture is tolled during the time the claimant is a fugitive.**

- **Where the Government seeks forfeiture of proceeds of a criminal offense, the limitations period runs from the time the Government became aware of the offense, but does not include any period when the claimant concealed the location of the criminal proceeds.**

Defendant was a South Florida drug dealer who used his drug proceeds to purchase a Wyoming ranch in 1987. Two years later, Defendant was indicted on drug charges and became a fugitive. For the next seven years, Defendant lived on the ranch under an assumed name. But in 1996, the Government discovered the existence of the ranch, apprehended Defendant, and filed a civil forfeiture action against the real property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A).

When Defendant was convicted in the criminal case, the Government filed a motion for summary judgment in the civil action. But Defendant filed a motion to dismiss the civil case on the ground that the complaint was filed outside the statute of limitations. He argued that 19 U.S.C. § 1621 bars the Government from filing a civil forfeiture action more than five years after the date of the discovery of the offense giving rise to the forfeiture. The fact that he was indicted on the drug charges in 1989, Defendant

forfeitable property in the indictment as long as it specified the property in a bill of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt I*) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (Rule 7(c)(2) does not require listing of property to be forfeited as substitute assets; sufficient for the Government to allege it sought to forfeit $3.7 million in proceeds); *United States v. Bellomo*, 954 F. Supp. 630 (S.D.N.Y. 1997) (substitute assets allegation in the indictment, plus bill of particulars, gives defendant adequate notice); *United States v. Cleveland*, 1997 WL 537707 (E.D. La. 1997) (property the Government intends to forfeit as proceeds need not be explicitly listed in the indictment).

Finally, the court's holding on the issue of gross proceeds versus net profits is a welcome addition to the list of cases that have come down on the Government's side of that issue. A clear majority of courts now follow the gross proceeds rule in criminal forfeiture cases. *See, e.g., United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996) (gross proceeds forfeitable in drug case); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (same in RICO/ money laundering case); *but see United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991). —*SDC*

Money Laundering / Structuring / Excessive Fines / Particularity

- **The civil forfeiture complaint in a structuring case satisfies the particularity requirement if it alleges that the perpetrator intended to evade the CTR reporting requirement; it need not allege that he knew about the requirement.**
- **District court in Illinois refuses to follow *Bajakajian;* in the Seventh Circuit, structured funds are an instrumentality of a structuring offense.**
- **District court says that the Seventh Circuit would apply a "pure instrumentality test" to civil forfeitures; thus the forfeiture of structured funds would not be unconstitutional, even if it's clean money.**
- **The Government need not allege defenses to Eighth Amendment challenges in its complaint, but need only allege facts tending to establish what the substantive forfeiture statute requires—*e.g.*, the property was "involved in" a money laundering offense.**
- **Excessive fines challenge is premature in a motion to dismiss. Claimant must wait until the Government establishes forfeitability at trial before raising Eighth Amendment issues.**

Claimant moved approximately $170,000 from one bank account to another by making numerous cash withdrawals of amounts under $10,000 from the first account and then making numerous cash deposits,

disentitlement doctrine" applied and, thus, refused to consider the appeals.

As to Defendant himself, the court held that he was a fugitive from justice who had refused to comply with the forfeiture order in his criminal case and had ignored both the contempt order and the arrest warrant. In the court's view, Defendant filed his appeal only in the hope of obtaining a reversal of the district court order; he demonstrated no likelihood that he would comply with an adverse judgment. Thus, the "fugitive disentitlement doctrine" applied and the court dismissed his appeal.

As to the wife, the court recognized that she was not a defendant in the criminal case and that no forfeiture judgment was entered against her. Nevertheless, by refusing to comply with the district court's orders, and by renouncing her citizenship and moving overseas, the wife had aided and abetted the Defendant's lack of compliance with the forfeiture judgment. Thus, the court concluded that she was a fugitive from the contempt order and ensuing arrest warrant, and that her fugitive status flouted the district court's authority in the criminal case. Accordingly, the "fugitive disentitlement doctrine" applied to her as well, and the court granted the Government's motion to dismiss her appeal. —*SDC*

United States v. Barnette, 129 F.3d 1179, (11th Cir. 1997). Contact: AUSA Charles Truncale, AFLMJ01(ctruncal).

Burden of Proof / RICO / Indictment

- **D.C. Circuit holds that in light of *Libretti*, the burden of proof in criminal forfeiture cases is preponderance of the evidence.**

- **The Government need not list all property subject to forfeiture in the indictment or even in a bill of particulars; it is sufficient if the indictment puts the defendant on notice that the Government will seek to forfeit all property subject to forfeiture under the terms of the applicable statute.**

- **Criminal forfeiture authorizes forfeiture of gross proceeds, not net profits; therefore defendants were not entitled to any deduction for taxes they had paid on forfeitable assets.**

Defendants were union officials who were convicted of RICO offenses involving ballot tampering in the election that resulted in their election to office. Among other things, the Government sought the forfeiture of Defendants' salaries and severance pay as property "acquired or maintained" through the racketeering activity. *See* 18 U.S.C. § 1963(a)(1).

The district court entered the forfeiture order, *United States v. DeFries*, 909 F. Supp. 13 (D.D.C. 1995), and Defendants appealed both the forfeiture and the underlying conviction. The **D.C. Circuit** overturned the conviction and, thus, vacated the forfeiture order. In so doing, however, the court addressed the forfeiture issues "to facilitate the disposition of the cases on remand."